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No. 90-6

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATHANIEL JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a charge of aggravated assault based on an attempt to expose the victim to the Human Immunodeficiency Virus (HIV) through uninformed, unprotected anal intercourse is unconstitutionally vague where the defendant knew that he was infected with HIV and recognized his responsibility to inform sexual partners of his condition and to prevent the transfer of his bodily fluids.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 30 M.J. 53. The opinion of the Air Force Court of Military Review (Pet. App. 11a-23a) is reported at 27 M.J. 798.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 12, 1990. The petition for a writ of certiorari was filed on July 9, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at McChord Air Force Base in Washington, petitioner, a member of the United States Air Force, was convicted of attempted anal sodomy, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880 (Charge 1); oral sodomy, in violation of Article 125, UCMJ, 10 U.S.C. 925 (Charge 2); and aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. 928 (Charge 3). Petitioner was sentenced to confinement for ten years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review dismissed the attempted anal sodomy charge on the ground that it was multiplicious with the aggravated assault charge,[1] affirmed the remaining findings, and reduced the period of confinement to six years. The court affirmed the convictions and sentence in all other respects. On discretionary review, the Court of Military Appeals affirmed.

1. Petitioner provided a blood sample in July 1987 that subsequently tested positive for the Human Immunodeficiency Virus (HIV). Pet. App. 12a. Petitioner was informed of the test results on August 31, 1987, and he was sent to the Wilford Hall Medical Center at Lackland Air Force Base in Texas for further testing, evaluation, and counseling. He remained a patient at the medical center from September 4 until about October 4, 1987. Tr. 277; PX 2. During that period, petitioner received extensive information about his medical condition and methods of prevent-

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[1] Both offenses were based upon the same act of attempted penetration of the victim's anus.

ing the transfer of HIV. This included lectures by medical personnel, therapy sessions, HIV support groups, and related literature. Tr. 52-58; PXs 5-9. Petitioner was given written guidance at least twice on "safe sex" or "low risk" sexual practices, which included using condoms during intercourse and informing prospective sexual partners of his HIV infection. Tr. 52-58; PXs 8-9.[2]

Petitioner later admitted to agents of the Air Force Office of Special Investigations that on December 13, 1987, after he had been released from the medical center and returned to McChord Air Force Base, he performed oral sodomy on J, a 17-year-old male civilian. He also admitted applying lubricant to J's anus and attempting to insert his penis. Tr. 88, 145-151, 196, 205-206, 223. Petitioner said that he served J three beers and four or five mixed drinks, and he admitted that J was too intoxicated to have rebuffed his sexual advances. Tr. 97-98, 149. Petitioner admitted that he never informed J that he was infected with HIV. Tr. 221. The trial judge, sitting in a bench trial, found that petitioner was not wearing a condom when he attempted to engage in anal intercourse with J. Tr. 270. At trial, petitioner acknowledged that he knew he was likely to spread the HIV infection if he engaged in anal intercourse without using a condom. Tr. 224.

2. At trial and on appeal petitioner argued that the offense of aggravated assault was unconstitution-

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[2] For example, on September 10, 1987, petitioner signed a form to obtain a pass from the medical center. The form stated in part, PX 9:

> I understand that I will inform sexual partners of my condition prior to sexual activity and will utilize appropriate protective measures during sexual intercourse.

ally vague where the "means * * * likely to produce death or grievous bodily harm" required by Article 128 was HIV infection.[3] The trial judge, the court of military review, and the Court of Military Appeals all rejected petitioner's claim. Tr. 21-22; Pet. App. 5a-7a, 19a-20a.[4]

ARGUMENT

Petitioner's sole claim is that the charge of aggravated assault under Article 128, UCMJ, 10 U.S.C. 928, is unconstitutionally vague when the aggravation element, *i.e.*, the "means * * * likely to produce death or grievous bodily harm," arises from his infection with HIV. That claim does not warrant review by this Court.

1. In the first place, petitioner was not prejudiced by the decision below. Petitioner was convicted of three charges: attempted anal sodomy (Charge 1), oral sodomy (Charge 2), and aggravated assault (Charge 3). The court of military review dismissed the charge of attempted anal sodomy because it was multiplicious with the charge of aggravated assault. Pet. App. 20a-21a. By so doing, the court of military review reduced the total punishment that petitioner faced. If petitioner were to prevail in his claim that he cannot be convicted of aggravated assault, on re-

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[3] The elements of aggravated assault under Article 128 are set forth at *Manual for Courts-Martial, United States—1984* Pt. IV, para. 54b(4)(a)(iv), at IV-94, and are reproduced at Pet. App. 7a.

[4] Judge Cox, writing for the Court of Military Appeals, stated that petitioner's claim he lacked fair notice that his blood or semen contained a means likely to produce death or grievous bodily harm "would leave any jurist incredulous." Pet. App. 6a.

mand the military courts could reinstate his conviction for attempted anal sodomy, which has a longer term of imprisonment than aggravated assault. Compare *Manual for Courts-Martial, United States—1984* (*Manual*) Pt. IV, para. 51e(3), at IV-91 (authorizing a five-year term of imprisonment for sodomy) with *id.* Pt. IV, para. 54e(8)(b), at IV-98 (authorizing a three-year term of imprisonment for assault likely to produce death or grievous bodily harm). The court of military review noted this irony when it vacated petitioner's conviction for attempted anal sodomy. Pet. App. 21a. Although on remand petitioner would not receive a sentence in excess of the six-year sentence he now faces, he could receive that identical term of imprisonment. See *United States* v. *Sales*, 22 M.J. 305 (C.M.A. 1986). Under these circumstances, petitioner was not prejudiced by the decision below.

2. In any event, the decision below is correct. Petitioner concedes that Article 128, which outlaws assault, is not unconstitutionally vague on its face. Pet. 5. Rather, he contends that Article 128 becomes "unintelligible regarding the conduct it seeks to proscribe," Pet. 5, when the government alleges that HIV is the "means * * * likely to produce death or grievous bodily harm" as required by Article 128. *Manual* Pt. IV, para. 54b(4)(a)(iv), at IV-94. Because Article 128 does not infringe First Amendment freedoms, petitioner's vagueness challenge must be evaluated in light of the particular facts of his case. *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). The question therefore is whether petitioner had fair warning that his own conduct was forbidden. *United States* v. *Powell*, 423 U.S. at 93; see *Rose* v. *Locke*,

423 U.S. 48, 49 (1975); *Wainwright* v. *Stone*, 414 U.S. 21, 22 (1973). If petitioner had such notice, he cannot complain that Article 128 could be vague when applied to others. *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

In light of petitioner's trial testimony, there is no basis for his claim that he was unaware that transmitting HIV was a "means * * * likely to produce death or grievous bodily harm." Petitioner admitted that he received extensive education on his disease, and that he knew of his responsibility to advise and protect his sexual partners. Tr. 222. Despite that knowledge, petitioner did not advise J that he was HIV positive, nor did petitioner wear a condom when his penis came in contact with J's buttocks. Tr. 104, 151, 222-224. Petitioner also admitted knowing that engaging in anal intercourse without using a condom was likely to spread HIV. Tr. 224-225. Accordingly, the facts show that petitioner was well aware that he was likely to transmit HIV to J by engaging in unprotected anal intercourse.[5] Under these circumstances, petitioner cannot claim that Article 128 is unconstitutionally vague. See *Parker* v. *Levy*, 417 U.S. 733, 756 (1974).

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[5] Petitioner's defense at trial was that he had used a condom, Tr. 205, and a condom was found in a trash can in petitioner's room, Tr. 157, 172-173; PX 11. But J testified that petitioner did not use a condom, Tr. 104-105, and the agents who found the condom said that it was buried beneath a quantity of other trash in the bottom of petitioner's trash can, Tr. 158-159, 173-176. The trial judge found that petitioner did not use a condom. Tr. 270.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20132